

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

EMERITO M. RAMOS,
Appellant,

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

CSA 8 039 067

DOCKET NUMBER
CH-0845-98-0780-I-1

DATE: MAY 4 1999

Emerito M. Ramos, Lorain, Ohio, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of the October 1, 1998 initial decision that dismissed his appeal as withdrawn. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal to the regional office for adjudication.

BACKGROUND

- ¶2 In March 1997, the Office of Personnel Management (OPM) advised the appellant that he had been overpaid \$1,932.40 from May 1993 to February 1997 because his annuity had not been reduced to provide the full survivor annuity he had elected for his spouse. OPM denied his request for reconsideration of its decision as untimely filed. On appeal to the Board, however, the administrative judge reversed OPM's decision denying his request as untimely and remanded the request to OPM for adjudication on the merits. *Ramos v. Office of Personnel Management*, MSPB Docket No. CH-0845-98-0034-I-1 (Initial Decision, Jan. 9, 1998) (Initial Appeal File (IAF), Tab 1).
- ¶3 On June 17, 1998, OPM issued a reconsideration decision affirming that the appellant had been overpaid \$1,932.40 and finding that he was not entirely without fault in the matter. IAF, Tab 4, subtab 2. However, OPM later found that the appellant was not at fault, but should have set aside the overpayment amount because he knew he was receiving an incorrect annuity. IAF, Tab 4. The appellant filed a petition for appeal of OPM's reconsideration decision. IAF, Tab 1.
- ¶4 A different administrative judge found that the appellant's petition for appeal was timely; however, he also found that the appellant withdrew his appeal during an October 1, 1998 telephonic conference. Accordingly, the administrative judge dismissed the appellant's appeal for lack of jurisdiction. IAF, Tab 8.

ANALYSIS

- ¶5 The appellant's petition for review asserts, in essence, that the administrative judge erred in dismissing his appeal as withdrawn. Petition for Review (PFR) at 1-4. Generally, the Board will not reinstate a withdrawn appeal absent unusual circumstances such as misinformation or new and material evidence. *See, e.g., Edney v. Office of Personnel Management*, 79 M.S.P.R. 60, ¶ 3 (1998) (Vice Chair Slavet concurring in part and dissenting in part). However, a voluntary

withdrawal must be clear, decisive, and unequivocal. *See, e.g., Garfield v. Department of Health & Human Services*, MSPB Docket No. DE-752B-98-0283-2-1, slip op. ¶ 8 (Mar. 18, 1999). We find that this requirement has not been satisfied here.

¶6 In the recorded portion of the telephonic conference, in which OPM's representative participated, the administrative judge stated as follows: "During the course of this conference today, I explained in some detail the basis for OPM's reconsideration decision to the appellant, Mr. Ramos, and he came to the conclusion that it wasn't quite as unreasonable as he had thought and he also decided that he wanted to withdraw his appeal. Isn't that correct, Mr. Ramos?" The appellant responded: "Yea." The administrative judge then stated: "And Mr. Ramos, aren't you withdrawing this appeal voluntarily?" The appellant again responded: "Yea." The administrative judge then stated that he would be issuing an initial decision dismissing the appeal. Prehearing Conference Tape.

¶7 We find that the appellant's mere acquiescence in statements made by the administrative judge does not clearly show that he intended to withdraw his petition for appeal. The record below and the appellant's petition for review indicate that he is confused because he believes that he "won" after the first initial decision remanding his appeal to OPM for adjudication on the merits was issued. *E.g., IAF*, Tabs 1, 6; PFR at 2-4. Moreover, the appellant is pro se and he admittedly cannot fully comprehend English. PFR at 3-4. In addition, he filed his petition for review within a week after the initial decision was issued. Under these particular circumstances, we find that the appellant did not intend to withdraw his petition for appeal. *See Amante v. Department of the Army*, 77 M.S.P.R. 636, 638 (1998).

ORDER

¶8 Accordingly, we VACATE the initial decision dismissing the appeal and REMAND the appeal to the regional office for adjudication on the merits.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.